

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of)	
the Pay Telephone Reclassification)	CC Docket No. 96-128
and Compensation Provisions of)	
the Telecommunications Act of 1996)	
)	NSD File No. L-99-34
RBOC/GTE/SNET Payphone Coalition)	
Petition for Clarification)	

COMMENTS OF WILTEL COMMUNICATIONS, LLC

June 23, 2003

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Summary

The Commission should allocate responsibility for payphone compensation to switch-based resellers, rather than the first facilities-based carrier to receive a dial-around call. Placing the facilities-based carrier between the two parties with the real economic interests creates substantial inefficiencies.

Even if the Commission continues to require the first facilities-based carrier to act as a middleman, it can greatly improve the current process by: clarifying the definition of a completed call and allowing a facilities-based carrier to rely on call records from its reseller customers, requiring the reporting of contracts that specify alternate compensation mechanisms, clarifying that PSPs cannot base compensation claims on the called-number's CIC, barring PSPs from submitting bills to carriers that have no compensation liability, preempting attempts to circumvent federal substantive rules and procedures by filing state law compensation claims, and clarifying that compensation claims (other than claims arising under express contracts) must be brought in the appropriate federal forum.

In the long run, simplifying the compensation scheme - providing for compensation for both complete calls and calls not completed beyond a platform - together with substantially reducing the per-call rate would reduce inefficiencies and benefit all industry participants.

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COMMENTS OF WITEL COMMUNICATIONS, LLC

WilTel Communications, LLC (“WilTel”) respectfully submits comments addressing the issues raised in the Commission’s Further Notice of Proposed Rulemaking. WilTel’s involvement in the voice telecommunications industry is as a wholesale provider. As a result, its reseller customers, rather than WilTel itself, have the end user relationships that generate dial-around calls. WilTel will focus its comments on ways of improving the interactions among payphone service providers (PSPs), local exchange carriers (LECs), switch-based resellers (SBRs), and the first facilities-based interexchange carriers (FIXCs) to receive a dial-around call.¹

I. Responsibility for Payphone Compensation

Initially, WilTel and several of its SBR customers believe that SBRs should have direct responsibility for making payphone compensation payments. In economic terms, payphones generate positive externalities that benefit the carrier receiving a dial-around call. Recognizing this, Congress and the Commission have sought to maximize overall

¹ WilTel primarily discusses payphone compensation in the context of calls to a calling-card platform, but most of its comments apply to dial-around collect calls as well.

utility by requiring the parties benefiting from the externalities to compensate those producing them. If market forces determined the means and amount of this compensation flow, PSPs would have output (payphone deployment) near the optimum level.

When an SBR receives a dial-around call, the current system places the FIXC between the two parties, the PSP and the SBR, who have the real economic interests. In addition, only the SBR can determine whether a call has been completed. Making the FIXC responsible for compensation in effect makes it a payment and information gathering clearinghouse. A more workable and logical system would be to require FIXCs to provide information to facilitate PSP collection of compensation from SBRs. WilTel anticipates that other parties will address this issue in greater depth.

II. Current Industry Processes

There are many ways for a dial-around call to reach a calling card platform. The following scenarios illustrate the flow of calls, data, and compensation within the industry:

Scenario 1 – LEC transports call directly to WilTel, which sends it to the WilTel calling-card platform. In these circumstances, WilTel has the information required to determine its compensation obligations. Assuming that end-users are not required to provide compensation and that a switchless reseller customer of WilTel does not have a contractual relationship with the PSP, it is reasonable to allocate payment responsibility to WilTel if the Commission improves the compensation process (discussed below).

Scenario 2 – LEC transports call to an IXC other than WilTel, and the IXC hands off the call to WilTel, which sends it to the WilTel calling-card platform. When a

call originates beyond WilTel's network, another carrier is the FIXC. The FIXC pays the PSPs and passes the cost through to WilTel, with a mark-up to cover administrative costs. However, many PSPs will improperly invoice WilTel for such dial-around calls, presumably because WilTel's carrier identification code (CIC) is associated with the dial-around number. Some PSPs have even resorted to litigation to collect for dial-around calls based solely on CIC information. Whether intended or not, these suits have a harassment effect, as the costs of defending them can exceed the amounts claimed.

Scenario 3 – LEC transports call directly to WilTel, which sends it to an SBR's calling-card platform. This is similar to Scenario 2, with WilTel assuming the FIXC role rather than the other IXC. The process problems are similar; the SBRs have to provide information to WilTel so that it can compute compensation obligations and assess a charge on the SBR to reimburse WilTel for its compensation and administrative costs.

Scenario 4 – LEC transports call to an IXC other than WilTel, which hands off the call to WilTel, which sends it to an SBR's calling-card platform. Combining Scenarios 2 and 3 compounds the problems resulting from placing WilTel and other wholesale carriers in a "middleman" position. WilTel must gather call completion information from its SBR customers and in turn forward the information to the other IXC. Given the dial-up industry's billing conventions, under which end users and resellers receive a bill in one month for calls made the preceding month, any disruption in this chain presents problems. For example, an SBR must make a determination as to whether a calling card call by its customer

was completed. Because the SBR has answer supervision beyond the calling card platform, it usually can distinguish a complete call from a busy, no-answer, or intercepted call. However, under certain circumstances the SBR may have to establish billing protocols to determine whether to charge for a call. With up to three or four carriers involved in reconciling call records, there is no real opportunity to resolve any resulting disputes without disrupting billing cycles.

In all of these scenarios a complicating factor is that the carrier operating the platform (WilTel in Scenarios 1 and 2 and an SBR in Scenarios 3 and 4) may have a direct contractual arrangement with a PSP, creating exceptions that the carriers must deal with on a case-by-case basis.

Almost all the problems and disputes in the last three scenarios arise because of the FIXC's involuntary role as a clearinghouse. Imposing that obligation is unnecessary, because market forces have created clearinghouses for both PSP-claimants (e.g., American Public Communications Council) and carrier-payors (e.g., National Payphone Clearinghouse). Moreover, as a result of an FIXC's role as "middleman," it often is caught between PSPs that are seeking payment and SBRs that seek to minimize payment. In complying with the FCC-imposed requirements, the FIXCs are subject to the administrative costs of making the correct payment and obtaining the correct reimbursement, as well (in each of the scenarios set out above) to nuisance lawsuits by PSPs claiming inadequate payment. If FIXCs must retain their "middleman" role, the FCC should reduce the FIXCs' burdens as set forth below.

III. Improving the Current Compensation Process

A. Clarifying Definition of Completed Call

Disputes among SBRs, FIXCs, and PSPs arise, among other reasons, over whether a call was completed. WilTel suggests the following “bright-line” approach: A call will be deemed completed if the end user’s carrier bills for the call as complete.

This approach has several advantages. First, it is market-driven; a carrier has every incentive to charge its customers for completed calls.² Second, it aligns the interests of the carrier and the PSP, reducing any incentive for underreporting. Third, it ties the compensation obligation to the derivation of economic benefit.

This rule also would facilitate verification through audits. The auditor would only need access to the payphone compensation call records and to the carrier’s billing records. Finally, the carrier providing the retail service can readily determine its payment obligations, tie the associated cost directly to the product provided, and fulfill its obligations to the underlying FIXC or to the PSPs.

B. Clarifying Tracking Responsibilities

1. FIXC Safe Harbor

Making FIXCs the collection agents for calls placed to their SBR customers imposes on wholesale carriers an impossible burden unless they can rely on a “safe harbor.” The Commission should state that, so long as FIXCs receive from SBRs a list of completed calls and base payments to PSPs on such a list, the FIXCs have met their requirements under the FCC’s compensation rules. Alternatively, the FCC can establish that FIXCs are within a “safe harbor” so long as they rely on certifications from those

SBRs as to the accuracy of their payphone call records. The certification process would be analogous to that for PSPs seeking compensation for payphones not included in a LEC's list of payphones,³ although it need not be as elaborate. WilTel suggests that the Commission require SBRs to provide a signed statement by an officer stating that the records it is providing are true and accurate to the best of its knowledge.

The Commission should provide that a PSP may only pursue and has the right to pursue a claim directly against an SBR, and not against the FIXC, if the FIXC produces such a certification. In the rare case where an SBR engaged in fraudulent activity or in the more common case where there was a bona fide dispute, this rule would ensure that the entities with the information and the economic interests at stake are the parties to the dispute.

2. SBR Responsibilities

The Commission should require SBRs to provide the certification described in B.1 above as well as complete call detail information to their underlying FIXCs, including identification of both completed and uncompleted dial-around calls. Understandably, some SBRs prefer to minimize their administrative burdens by providing information only on completed calls. However, that approach saddles FIXCs with the burden of defending nonpayment for dial-around calls with no supporting information. Proving that something never occurred is always difficult but particularly so for an FIXC that does not have answer supervision beyond a calling card platform. With the ability to identify uncompleted calls and receive confirmation that they were not

² Exceptions may include calls resulting from fraud and calls placed from a malfunctioning telephone.

³ 47 CFR 64.1310(e) (2002).

completed, FIXCs will be able to reconcile charges with PSPs more effectively and more accurately. Uniformity through rulemaking by the FCC in this case would allow FIXCs to comply with FCC rules without concern that other FIXCs will seek competitive advantage through misinterpretation of the rules.

3. Reporting Existence of Contracts

The Commission should require both SBRs and PSPs to report the existence of any contracts that provide alternate means or pricing for payphone compensation. FIXCs, without such information, may have to make retroactive adjustments or seek repayment from PSPs who have double recovered through direct compensation arrangements.

C. Reducing Unfounded Payphone Compensation Claims and Litigation

1. Clarifying Use of CIC for Billing Purposes is Unauthorized

Like other carriers, WilTel has had to defend a number of suits, often styled as “collection actions” or “open accounts” where the PSP is attempting to collect compensation based on calls it believes were completed to dial-around numbers for which WilTel is the designated carrier.⁴ Resolving such suits and claims is time-consuming and may represent nothing more than PSP frustration with payment delays or ignorance of the appropriate process.

While the CIC owner is often the FIXC responsible for compensation payments, a call may be carried to the CIC owner over facilities of another interexchange carrier.⁵ In

⁴ In some instances, WilTel may have had its CIC associated with the called number, but not at the time the call was placed.

⁵ See Scenario 2 in Section II, above.

addition, the CIC assigned to a telephone number can change over time. In some instances, resellers may use multiple carriers to serve a single toll-free number, using time-of-day routing or allocating a portion of calls to different destinations and over different carriers. For these reasons, a suit based on a “snapshot” listing of CICs associated with a dial-around number at any given time does not match compensable calls to the FIXC with the compensation obligation.

Although the Commission has already rejected the use of CICs to determine compensation obligations,⁶ WilTel’s experience indicates that clarification or reiteration of this position would reduce PSP-carrier disputes as well as the burden of defending numerous frivolous suits.

2. Precluding Submission of Bills Absent Agreement

Some PSPs issue payphone compensation invoices to carriers that are not the FIXC for a call and that do not have an agreement with the PSP. This presents a risk of double-recovery and is not authorized by Commission rules. WilTel respectfully requests that the Commission clarify that a PSP has no right to issue invoices unless (a) it has a contractual relationship with the billed party or (b) the billed party is the carrier directly liable for payphone compensation under the Commission’s rules.

3. Preempting State-Law Claims

The Commission should preempt state law claims. At least one court has allowed a PSP to pursue compensation claims under state law on the basis of quantum meruit.⁷ If

⁶ *Sprint Corp. v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (the Commission considered but declined to adopt a proposal to base compensation obligations on the CIC of the number dialed from a payphone).

⁷ *Precision Pay Phones v. Qwest Communications Corp.*, 210 F. Supp. 2d 1106 (N.D. Cal. 2002).

this somewhat bizarre development spreads, the Commission and the industry will quickly lose control over compensation issues. The Commission should clarify that the right to receive payphone compensation arises solely under federal law (the Commission regulations adopted pursuant to the Congressional command embodied in Section 276) and that there is no state-law right to collect such payments, except to the extent a PSP and a carrier have entered into an express agreement governing payphone compensation.

The Commission should also clarify that payphone compensation actions suits in State court are improper. As the Ninth Circuit Court of Appeals has explained, the “express language” of 47 USC § 207 “establishes concurrent jurisdiction in the FCC and federal district courts only, leaving no room for adjudication in any other forum - be it state, tribal, or otherwise.” A plaintiff seeking “vindication of its [Federal Communications Act]-based claim . . . [can] choose only between filing a complaint with the FCC or suing . . . in federal district court.”⁸ In addition, many PSPs are small businesses and may not even engage an attorney to analyze their claims and to advise on the proper method of pursuing them. Other PSPs may be filing claims as a harassment tactic. In any case, the Commission could assist PSPs and FIXCs by making it clear not only that state law is preempted, but also that state courts have no subject matter jurisdiction to resolve payphone compensation issues. Unless a party’s primary interest is filing of harassment suits, it also will benefit from the Commission’s flexibility in combining similar claims. For example, the Commission appropriately entertains claims

⁸ *AT&T Corp. v. Coeur D’Alene Tribe*, 295 F.3d 899, 904 (9th Cir. 2002). Some federal district courts have ruled that Commission regulations do not create a private right of action, even in federal district court. *E.g., Phonetel Technologies, Inc. v. Network Enhanced Telecom*, 197 F. Supp. 2d 720, 721-22 (E.D. Tex. 2002). WilTel is not suggesting that the Commission take a position on that jurisdictional issue.

brought by APCC on behalf of its PSP clients,⁹ even though APCC does not have standing to bring such claims as federal court suits.¹⁰ Even if state courts possessed the expertise to determine payphone compensation issues and accepted the Commission-determined compensation rate, the exposure to multiple state judicial interpretations would create confusion and a lack of uniformity.

IV. Long-Term Solution – Compensation for All Dial-Around Calls

WilTel shares the Commission's desire to move to a compensation system based primarily on market-based arrangements. Until such a system is feasible, however, WilTel believes the best long-term solution to the problems confronting all companies involved in payphone compensation issues is to simplify the compensation rules.

Specifically, the Commission should (1) extend the compensation obligation to all calls to a platform with (a) answer supervision at a calling card (or analogous) platform and (b) a measurable call duration (i.e., excluding calls of 0 seconds), and (2) significantly reduce the per-call compensation rate. These changes would: almost eliminate the administrative burden, delays in payment, and disputes arising from the need to determine whether a dial-around call was completed; substantially reduce the fact-intensive nature of compensation disputes and make enforcement and collection easier; more accurately reflect the burden on PSPs, which incur almost the same costs (opportunity costs and actual costs) regardless of whether a dial-around call is complete; provide PSPs with the same or greater economic benefit than they receive under the

⁹ See, e.g., *APCC Services, Inc. v. TS Interactive, Inc.*, 17 FCC Rcd 25523 (Enforcement Bureau 2002); *id.* ¶ 4 n.12 (listing seven similar complaints filed by APCC Services in April 2002).

¹⁰ *APCC Services, Inc. v. AT&T Corp.*, 254 F. Supp. 2d 135 (D.D.C. 2003).

current regulations, by reducing collection costs, increasing the payment rate, and reducing payment delays; reduce the incentive to cheat, either by generating calls at the payphones or by underreporting compensable calls; allow carriers to treat compensation costs as overhead that need not be allocated to cost-causing end users; align rates more closely with the actual incremental cost of each dial-around call; and reduce the extreme disparity between compensation costs (currently almost \$0.05 per minute for a five-minute call) and the other cost components of long distance service.

V. Conclusion

WilTel believes the Commission should, as it did before 2001, make SBRs directly responsible for payphone compensation, rather than requiring the FIXC to intermediate between its SBR customers and PSPs. Even if the Commission elects to retain the existing allocation of responsibility, it could adopt reforms and make clarifications that would reduce the inefficiencies in the compensation process. The Commission should consider a streamlined compensation system that substantially reduces the per-call rate but provides PSPs compensation for calls completed to a calling card platform, even if the call is not completed beyond that point.

Respectfully submitted,

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